

No. 12559

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United States  
Court of Appeals  
for the Ninth Circuit.

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MOORE EQUIPMENT CO., INC., a Corporation,  
Appellant,

vs.

JOHN O. ENGLAND, as Trustee of the Estates of  
Ted E. Fisher and Maxeen R. Fisher, Bankrupt,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court,  
Northern District of California,  
Northern Division.

JUL 24 1950

PAUL P. O'BRIEN, JR.  
Clerk



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, Calif.,

Attorneys for Plaintiff.

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DANIEL S. LANE,

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RICHARD B. DALEY,

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Attorneys for Defendant.

In the Northern Division of the United States  
District Court for the Northern District of  
California

No. 6174, Civil Action

JOHN O. ENGLAND, as Trustee of the Estates of  
TED E. FISHER and MAXEEN R. FISHER,  
Bankrupts,

Plaintiff,

vs.

MOORE EQUIPMENT CO., INC., a Corporation,  
Defendant.

## COMPLAINT TO RECOVER A PREFERENCE

Plaintiff complains of Defendant and for cause  
of action alleges:

### I.

That on the 25th day of May, 1948, Ted E. Fisher and Maxeen R. Fisher filed their Voluntary Petitions in Bankruptcy with the Clerk of the above-entitled Court, and that thereafter, and after proceedings duly and regularly had, said Ted E. Fisher and Maxeen R. Fisher were adjudged bankrupts and the proceedings with reference to the administration of their estates were referred to Hon. Evan J. Hughes, one of the Referees in Bankruptcy of the above-entitled Court.

### II.

That thereafter, at a first meeting of creditors of the estates of each of said Bankrupts, held before



said Referee in Bankruptcy, Plaintiff was elected Trustee of the estates of each of said Bankrupts, qualified as such Trustee by filing the bonds in the penal sum set by the Court, and ever since has been and now is the duly elected, qualified and acting Trustee of the estates of said Ted E. Fisher and of said Maxeen R. Fisher; that the proceedings in the matter of the administration of the estate of Maxeen R. Fisher were consolidated by order of the above-entitled Court with the proceedings in the matter of Ted E. Fisher.

### III.

That during all of the times herein mentioned, Moore Equipment Co., Inc., was and is a corporation organized and existing by virtue of the laws of the State of California and maintaining its principal place of business in the County of San Joaquin, said State.

### IV.

That heretofore and on or about the 8th day of April, 1948, and within four months of the filing of said Petition in Bankruptcy, and while said Bankrupts were insolvent, Defendant took possession of a certain Allis-Chalmers "W" Speed Control, Serial No. 1E2191 which was then the property of said Bankrupts in full and/or partial satisfaction of a general unsecured antecedent indebtedness then due by said Bankrupts to Defendant.

### V.

That said Bankrupts had executed a Chattel Mortgage to said Moore Equipment Company covering

said equipment described in paragraph IV, but that said mortgage was invalid as against your Plaintiff in that the same was not recorded in the County of Stanislaus, the county in which said equipment was located for a period in excess of thirty days.

#### VI.

That at the time of the execution of the said Chattel Mortgage and at the time of the taking possession of said equipment there were other general unsecured creditors of said Bankrupts of the same class as Defendant who still are creditors of said Bankrupts and who have filed claims in said bankruptcy proceedings. That there are insufficient funds in the hands of Plaintiff to pay the claims of the creditors of said Bankrupts in full.

#### VII.

That at the time of the receipt of the hereinabove described personal property by Defendant, Defendant knew, or had reasonable cause to believe that said Bankrupts were insolvent.

#### VIII.

That Plaintiff has no information or belief as to whether said equipment is still in the possession of Defendant, but Plaintiff is informed and believes and therefore alleges that the said equipment more particularly described in paragraph IV hereinabove was worth at the time of the repossession thereof the sum of Two Thousand Three Hundred Six and 25/100 (\$2,306.25) Dollars.

IX.

That on the 22nd day of June, 1948, Plaintiff demanded of Defendant the return of said preference but that Defendant has failed, refused and neglected to comply with said demand.

Wherefore Plaintiff, as such Trustee, prays judgment against Defendant in the sum of Two Thousand Three Hundred Six and 25/100 (\$2,306.25) Dollars, together with interest thereon at the rate of 7% per annum from the 22nd day of June, 1948, to the date of payment, and for Plaintiff's costs and disbursements incurred herein and for such further and other order as may be just and proper in the premises.

SHAPRO & ROTHSCILD,

By /s/ AUGUST B. ROTHSCILD,  
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed May 12, 1949.

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[Title of District Court and Cause.]

ANSWER

Comes Now, Defendant Moore Equipment Co., Inc., a corporation, and in answer to Plaintiff's complaint, admits, denies and avers as follows, to wit:

First Defense

I.

The complaint herein fails to state a claim against this Defendant upon which relief can be granted.

## Second Defense

## I.

Defendant admits the allegations of Paragraphs I, II, III and X of said complaint; admits that portion of Paragraph IV alleging that it took possession of a certain Allis-Chalmers "W" Speed Control, Serial No. 1E2191; admits that the Bankrupt, Ted E. Fisher, had executed a chattel mortgage to secure said property and that the same was not recorded in Stanislaus County as alleged in Paragraph V; alleges that it is without knowledge or information as to the truth of the allegations contained in Paragraph VI; denies each and every other allegation contained in the complaint.

## Third Defense

## I.

On February 26th, 1948, the Bankrupt, Ted E. Fisher, purchased from Defendant an Allis-Chalmers WC Road Grader, Serial Number 1E2191; that upon making said purchase, the said bankrupt made and delivered his promissory note to Defendant in the total principal sum of Fourteen thousand nine hundred sixty-five and 68/100ths (\$14,965.68) Dollars, which sum included the full purchase price of the described equipment, together with other indebtedness owed to Defendant by the said Bankrupt; said note by its term was payable in installments at the rate of Three thousand and no/100ths (\$3,000.00) Dollars on April 1st, 1948,

and Nine hundred ninety-seven and 14/100ths (\$997.14) Dollars per month on the 1st day of each month thereafter for twelve (12) successive months; that on said date, said Bankrupt made and executed a chattel Mortgage to this Defendant, mortgaging said Allis-Chalmers road grader and other property to secure the payment of said promissory note.

## II.

Said chattel mortgage provided in part that the equipment so mortgaged was to be permantly located and garaged at Manteca, California, and that the said Bankrupt resided in Manteca, California; that Manteca, California, is located in San Joaquin County, State of California; that said mortgage, being Instrument Number 6314, was recorded in the Office of the County Recorder in and for said County and State at 10:05 o'clock a.m. on February 28th, 1948, in Volume 1113 of Official Records, page 154.

## III.

That the said Bankrupt, as such mortgagor, voluntarily removed and permitted the removal of the mortgaged property from San Joaquin County, California, to Stanislaus County, California; that on April 8th, 1948, and prior to the date of the filing of the voluntary petition in bankruptcy, Defendant, for the purpose of foreclosing its lien created by said chattel mortgage, took possession of said property in Stanislaus County; that under and pursuant to the laws of the State of California, the Defendant, at the time of said

repossession, had a valid and subsisting lien on said property, which dated from the date of the execution of said mortgage, which lien was superior to the claim of general unsecured creditors of said Bankrupt and was superior to any claim of Plaintiff herein.

#### IV.

That at the time Defendant repossessed said property, the said Bankrupt was in default in payment of the installments due and payable by the terms of said note; that upon taking possession and by virtue of the power of sale contained in said mortgage, and in accordance therewith, Defendant sold said property at private sale; that the said repossession and said sale did not constitute a preference within the meaning of the Bankruptcy Act.

Wherefore, Defendant prays that Plaintiff take nothing by reason of his complaint; that said complaint be dismissed and that this Defendant have judgment for its costs herein incurred, and for such other and further relief as may be proper.

GILBERT L. JONES,  
DANIEL S. LANE,  
ROY A. WEAVER and  
RICHARD B. DALEY,

By /s/ ROY A. WEAVER,  
Attorneys for Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 30, 1949.



[Title of District Court and Cause.]

## STIPULATION OF FACTS

The parties to the above-entitled action, by their respective attorneys, agree upon the following statement of the facts in said action, and submit the same to the Court as true.

### I.

That on the 25th day of May, 1948, Ted E. Fisher and Maxeen R. Fisher filed their Voluntary Petitions in Bankruptcy with the Clerk of the above-entitled Court, and that thereafter, and after proceedings duly and regularly had, said Ted E. Fisher and Maxeen R. Fisher were adjudged bankrupts and the proceedings with reference to the administration of their estates were referred to Hon. Evan J. Hughes, one of the Referees in Bankruptcy of the above-entitled Court.

### II.

That thereafter, at a first meeting of creditors of the estates of each of said Bankrupts, held before said Referee in Bankruptcy, Plaintiff was elected Trustee of the estates of each of said Bankrupts, qualified as such Trustee by filing the bonds in penal sum set by the Court, and ever since has been and now is the duly elected, qualified and acting Trustee of the estates of said Ted E. Fisher and of said Maxeen R. Fisher: that the proceedings in the matter of the administration of the estates of Maxeen R. Fisher were consolidated by order of the

above-entitled Court with the proceedings in the matter of Ted E. Fisher.

### III.

That during all of the times herein mentioned, Moore Equipment Co., Inc., was and is a corporation organized and existing by virtue of the laws of the State of California and maintaining its principal place of business in the County of San Joaquin, said State.

### IV.

On February 26th, 1948, the Bankrupt, Ted E. Fisher, purchased from Defendant an Allis-Chalmers WC Road Grader, Serial Number 1E2191; that upon making said purchase, the said bankrupt made and delivered his promissory note to Defendant in the total principal sum of Fourteen thousand nine hundred sixty-five and 68/100ths (\$14,965.68) Dollars, which sum included the full purchase price of the described equipment, together with other indebtedness owed to Defendant by the said Bankrupt; said note by its term was payable in installments at the rate of Three thousand and no/100ths (\$3,000.00) Dollars on April 1st, 1948, and Nine hundred ninety-seven and 14/100ths (\$997.14) Dollars per month on the 1st day of each month thereafter for twelve (12) successive months; that on said date, said Bankrupt made and executed a chattel mortgage to this Defendant, mortgaging said Allis-Chalmers road grader and other property to secure payment of said promissory note.



V.

Said Chattel mortgage provided in part that the equipment so mortgaged was to be permanently located and garaged at Manteca, California, and that the said Bankrupt resided in Manteca, California; and that Manteca, California, is located in San Joaquin County, State of California; that said mortgage, being Instrument No. 6314, was recorded in the Office of the County Recorder in and for County and State at 10:05 o'clock a.m. on February 28th, 1948, in Volme 1113 of Official Records, page 154.

VI.

That after the execution of said Chattel Mortgage, aforesaid, the said Bankrupt, as said Mortgagor, voluntarily removed and permitted the removal of the said mortgaged property from San Joaquin County, State of California, to Stanislaus County, California; that said mortgaged property remained in Stanislaus County for more than thirty days; that the aforesaid chattel mortgage was not recorded in Stanislaus County; that on April 8, 1948, within four months from the filing of the aforesaid Petition in Bankruptcy, Defendant took possession of said mortgaged property in Stanislaus County.

VII.

That at the time Defendant repossessed said property the said Bankrupt was in default in payment of the installment due and payable by the terms of said note; that after taking possession, and by virtue of the power of sale contained in said chattel mortgage,

and in accordance therewith, Defendant sold said property at private sale; that said sale was made on May 1, 1948, to a bona fide purchaser for value.

### VIII.

That at the time of the taking possession of said equipment there were general unsecured creditors of said Bankrupt, who have filed claims in said bankruptcy proceeding; that there are not sufficient funds in the hands of the Plaintiff to pay the claims of said bankruptcy in full.

### IX.

That at the time that Defendant repossessed the said above-described property, as aforesaid, said Defendant had reasonable cause to believe that on said date the said Bankrupt was insolvent.

### X.

That at the time of the repossession of said equipment, it was worth the sum of One Thousand Eight Hundred Sixty and 00/100 (\$1,860.00) Dollars.

### XI.

That on the 22nd day of June, 1948, Plaintiff demanded of Defendant the return of said property, but that the Defendant has refused to comply with said demand.

SHAPRO & ROTHSCHILD,

By /s/ RAYMOND B. ANIXTER,  
Attorneys for Plaintiff.

GILBERT L. JONES,  
DANIEL S. LANE,  
ROY A. WEAVER and  
RICHARD B. DALEY,

By */s/* DANIEL S. LANE,  
Attorneys for Defendant.

[Endorsed]: Filed October 11, 1949.

[Title of District Court and Cause.]

## AMENDMENT TO STIPULATION OF FACTS

The Stipulation of Facts heretofore filed in the above titled action by the Attorneys for the respective parties thereto is hereby amended in the following particulars, to wit: Paragraph IX of said Stipulation is hereby amended to read as follows:

### IX.

That at the time that Defendant repossessed the said above-described property as aforesaid, said Bankrupt was insolvent and said Defendant had reasonable cause to believe that on said date the said Bankrupt was insolvent.

In all other respects the aforesaid Stipulation of Facts shall remain as heretofore filed.

SHAPRO & ROTHSCHILD,

By /s/ RAYMOND T. ANIXTER,  
Attorneys for Plaintiff.

GILBERT L. JONES,

DANIEL S. LANE,

ROY A. WEAVER and

RICHARD B. DALEY,

By /s/ DANIEL S. LANE,  
Attorneys for Defendant.

[Endorsed]: Filed January 16, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The above-entitled cause came on regularly for pre-trial conference on the 1st day of September, 1949; that it was thereupon stipulated that said cause may be submitted upon an agreed Stipulation of Facts and the above-entitled Court thereupon made its Order, submitting said cause upon the filing of an agreed Stipulation of Facts; that, thereafter a Stipulation of Facts was duly filed herein, and, subsequently thereto an amendment to Stipulation of Facts was duly filed herein; and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises, now makes its findings of fact as follows:

Findings of Fact

1. That the allegations contained in Paragraph I of Plaintiff's complaint are true.
2. That the allegations contained in Paragraph II of Plaintiff's complaint are true.
3. That the allegations contained in Paragraph III of Plaintiff's complaint are true.
4. That on the 26th day of February, 1948, the Bankrupt, Ted E. Fisher, purchased from Defendant an Allis Chalmers W. C. Road Grader, Serial No. 1E2191; that upon making said purchase, the said Bankrupt made and delivered his Promissory Note to Defendant in the total principal sum of

\$14,965.68, which sum included the full purchase price of the described equipment, together with other indebtedness owed to Defendant by the said Bankrupt; that said note, by its terms, was payable in installments at the rate of \$3,000.00 on April 1, 1948, and \$997.14 per month on the 1st day of each month thereafter for twelve successive months; that on said day, said Bankrupt made and executed a Chattel Mortgage to said Defendant, mortgaging said Allis Chalmers Road Grader and other property to secure the payment of said note. Said Chattel mortgage provided in part that the equipment so mortgaged was to be permanently located and garaged at Manteca, California; and that the said Bankrupt resided in Manteca, California; and that Manteca, California, is located in San Joaquin County, State of California; that said mortgage, being Instrument No. 6314, was recorded in the Office of the County Recorder in and for said county and state at 10:05 o'clock a.m. on February 28th, 1948, in Volume 1113 of Official Records, page 154.

5. That the allegations of Paragraph IV of Plaintiff's complaint are true.

6. That after the execution of the aforesaid Chattel Mortgage, the said Bankrupt, as said Mortgagor, voluntarily removed and permitted the removal of the said mortgaged property from San Joaquin County, State of California, to Stanislaus County, California; that said mortgaged property remained in Stanislaus County for more than 30 days; that the aforesaid Chattel Mortgage was not recorded in Stanislaus County; that on April 8, 1949, within

four months from the filing of the aforesaid Petition in Bankruptcy, Defendant took possession of said mortgaged property in Stanislaus County; and that after taking possession, and by virtue of the power of sale contained in said Chattel Mortgage, and in accordance therewith, Defendant sold said property at private sale to a bona fide purchaser for value. That said sale was made on May 1st, 1948, to a bona fide purchaser for value; that at the time Defendant repossessed said property, the said Bankrupt was in default in payment of the installment due and payable by the terms of said note.

7. That all of the allegations contained in Paragraph VI of Plaintiff's complaint are true.

8. That at the time that Defendant repossessed the said above-described property as aforesaid, said Bankrupt was insolvent and said Defendant had reasonable cause to believe that on said date the said Bankrupt was insolvent.

9. That at the time of the repossession of said equipment, as aforesaid, it was worth the sum of \$1,860.00.

10. That all of the allegations contained in Paragraph IX of Plaintiff's complaint are true.

11. That the allegations contained in Defendant's first defense are untrue.

12. That the allegations contained in Paragraph III of Defendant's third defense commencing with the words on page 3, line 11 and reading as follows, towit: " \* \* \* the Defendant, at the time of said



repossession had a valid and subsisting lien on said property, which dated from the date of the execution of said mortgage, which lien was superior to the claim of general unsecured creditors of said Bankrupt and was superior to any claim of Plaintiff herein," are untrue.

13. That the allegations contained in Paragraph 4 of Defendant's third defense commencing on page 3, line 23 and reading as follows, to wit: "that the said repossession and said sale did not constitute a preference within the meaning of the Bankruptcy Act," are untrue.

From the foregoing facts, the Court concludes:

#### Conclusions of Law

1. That at the time of the taking of possession of the personal property purported to be secured by the Chattel Mortgage, on the 8th day of April, 1948, Defendant was an unsecured general creditor and, by such repossession, obtained a voidable preference, in accordance with the provisions of Section 60B of the Acts of Congress relating to Bankruptcy, over other general unsecured creditors of the said Bankrupt Ted Fisher.

2. That at the time of the taking possession of said personal property by Defendant, the Chattel Mortgage securing said property was invalid as against the creditors of the Bankrupt, Ted Fisher.

3. That at the time of the taking of possession by Defendant of the said personal property as afore-



said on the 8th day of April, 1948, the personal property secured by said Chattel Mortgage was exempted from the operation of said mortgage, as against the creditors of the Bankrupt, Ted Fisher.

4. That Plaintiff is entitled to judgment in the sum of \$1,860.00, the stipulated value of the personal property repossessed, at the time of the repossession, together with interest at the rate of 7% per annum from the 22nd day of June, 1948, to the date of payment, and for Plaintiff's costs and disbursements incurred herein.

Let Judgment be entered accordingly.

Dated: This 15th day of February, 1950.

/s/ DAL M. LEMMON,  
United States District Judge.

[Endorsed]: Filed February 15, 1950.

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In the Northern Division of the United States  
District Court for the Northern District of  
California

No. 6174 Civil Action

JOHN O. ENGLAND, as Trustee of the Estates of  
TED E. FISHER and MAXEEN R. FISHER,  
Bankrupts,

Plaintiff,

vs.

MOORE EQUIPMENT CO., INC., a Corporation,  
Defendant.

### JUDGMENT

This cause came on regularly for pre-trial before

the Court, sitting without a jury, on the first day of September, 1949, Messrs. Shapro & Rothschild by Raymond T. Anixter, Esq., appeared as Attorneys for Plaintiff and Gilbert L. Jones, Daniel S. Lane and Roy A. Weaver by Daniel S. Lane, Esq., appeared as Attorneys for Defendant, and the Court having ordered the matter to be submitted upon the filing of an agreed Stipulation of Facts, and said agreed Stipulation of Facts having been thereafter duly filed and said cause having been duly submitted, and the Court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of Law and having directed that Judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid;

It Is Hereby Ordered, Adjudged and Decreed that the transfer of possession to the Defendant of that certain Allis-Chalmers W. C. Road Grader described in Plaintiff's complaint on the 8th day of April, 1948, within 4 months of the date of the filing of the Petition in Bankruptcy by the Bankrupt Ted E. Fisher, be and is hereby vacated and annulled as a voidable preference under the provisions of Section 60B of the Acts of Congress relating to Bankruptcy.

It Is Further Ordered, Adjudged and Decreed that Plaintiff do have and recover from the Defendant, Moore Equipment Co., Inc., a Corporation, the sum of \$1,860.00 as the value of the aforesaid personal property, together with interest on said sum

at the rate of 7% per annum from the 22nd day of June, 1948, until the date of payment.

It Is Further Ordered, Adjudged and Decreed that Plaintiff above-named do have and recover from and of the Defendant above-named for its Court costs herein incurred and to be hereafter taxed as such herein, the sum of \$. . . . .

Dated at Sacramento, California, in this District, this 15th day of February, 1950.

/s/ DAL M. LEMMON,  
District Judge.

Entered in Civil Docket Feb. 16, 1950.

C. W. CALBREATH,  
Clerk.

By /s/ C. C. EVANSEN,  
Deputy Clerk.

Lodged January 31, 1950.

[Endorsed]: Filed February 15, 1950.

[Title of District Court and Cause.]

NOTICE OF INTENTION TO MOVE  
FOR A NEW TRIAL

To John O. England, as Trustee of the Estates of Ted E. Fisher and Maxeen R. Fisher, Bankrupts, Plaintiff above-named, and to Shapro & Rothschild, his Attorney:

You, and Each of You, Will Please Take Notice that on the 13th day of March, 1950, at 10:00 o'clock a.m. of said day, at the Courtroom of the United States District Court, New Post Office Building, Sacramento, California, the Defendant above-named intends to move the above-entitled Court to vacate and set aside the decision of the Court rendered in the above-entitled action, and to grant a new trial of said cause upon the following grounds materially affecting the substantial rights of said Defendant, to wit:

1. Insufficiency of the evidence to justify the decision.
2. That the decision is against and contrary to the law and the facts.
3. That the learned Court erred in entering judgment for the Plaintiff.

Said motion, with regard to each and all of the above-mentioned grounds, will be made upon the minutes of the Court and upon the records and files

in the above-entitled action and upon this Notice of Intention to Move for a New Trial.

Dated: This 21st day of February, 1950.

JONES, LANE & WEAVER,  
Attorneys for Defendant.

[Endorsed]: Filed February 23, 1950.

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[Title of District Court and Cause.]

ORDER DENYING MOTION FOR  
NEW TRIAL

The validity of the mortgage in controversy has not been attacked up to the time the property, the subject of the mortgage, was removed from San Joaquin County to Stanislaus County. The mortgage appears to have conformed to the law and was a valid and subsisting lien upon the personal property up to that time. At the time the mortgage was executed and recorded the property was located in San Joaquin County. It was later moved to Stanislaus County and remained there more than 30 days, following which the property was taken by the mortgagee on April 8, 1948, and sold by it at private sale on May 1, 1948. The mortgage was never recorded in Stanislaus County, the county in which the property remained after it was removed thereto and up until the time of sale.

At common law delivery to and possession by the mortgagee of a mortgaged chattel was required.

This has become changed by statute in California and recordation has been substituted for delivery and possession. *Ruggles v. Cannedy*, 127 Cal. 290, 297. The authority for the creation of a chattel mortgage in this state derives its source from the statutory enactments and all rights accruing by virtue of such mortgages can be protected and preserved only by fully meeting the requirements of the statute and strictly observing its provisions. *Hopper v. Keys*, 152 Cal. 488.

Section 3440 of the Civil Code of the State of California was designed to prevent secret liens upon and secret transfers of personal property and requires in order to effect a transfer of personal property that there be an immediate delivery and continued change in possession, without which the transfer is void as to creditors and as to purchasers and encumbrancers in good faith. Mortgages allowed by law are exempted therefrom. Mortgages not executed and recorded as provided by law are subject to the penalty provided under Section 3440. *Ruggles v. Cannedy*, *supra*.

There is presented to the Court the question as to whether or not the mortgage, though valid in its inception, was no longer in existence at the time of the private sale above-mentioned.

The conditions which must be complied with in the creation of a valid lien upon personal property are found in Section 2957 of the Civil Code. Among other requirements enumerated therein are those for recording of mortgages of property, such as here



involved, in the offices of the recorder of the county where the property is located, of the county where the mortgagor resides at the time the mortgage is executed and "in the county to which such property is thereafter removed."

Section 2965 of the Civil Code provides that if mortgaged personal property, such as the property here under consideration, is removed from the county in which it is situated, the lien or mortgage shall not be effected by such removal for a period of 30 days after such removal, but that, after the expiration of the 30 days, the property is exempted from the operation of the mortgage, except as between the parties thereto, until either:

1. The mortgagee causes the mortgage to be recorded in the county to which the property has been removed; or

2. The mortgagee takes possession of the property as prescribed in the next section.

The next section (Section 2966) provides: "If the mortgagor voluntarily removes or permits the removal of the mortgaged property \* \* \* from the county in which it was situated at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due."

Other sections provide the procedure for sale under pledges. It is agreed that these provisions were not substantially or at all complied with and that the sale was not had as required and provided by these sections. It is the mortgagee's contention

that upon taking possession of the property, after the 30 day period, the mortgage and all of its provisions were revived and consequently he was empowered to sell under the terms and provisions of the mortgage and was not limited to foreclose as provided in the Sections dealing with pledges.

As has been shown, personal property mortgages exist and have their basis under the Civil Code provisions. If the position taken by the mortgagee is correct the concluding clause of Section 2965 reading "as prescribed in the next section" is meaningless and has no bearing upon the rights of the parties or upon the status of the mortgage. No California case has been called to my attention which decides the question.

With defendant's contention I do not agree. The sections above-mentioned are in para materia. If a mortgage does not conform to the provisions of the statute as to execution and recordation it is of no validity as against creditors. The words above-quoted point to the nature of the possession required in order to revive the mortgage. They are words of qualification. It is not mere possession which satisfies the statute but possession as prescribed by Section 2965, namely for the purpose and to the end of selling the property "as a pledge for the payment of the debt." The possession which the mortgagee obtained was not for that purpose but for the purpose of sale under the terms of the mortgage.

The interpretation of these related code sections is to be had in the light of the legislative intention.



The intent to use meaningless or purposeless words should not be indulged in. *French v. Teschemaker*, 24 Cal. 518, 557. Words should never be considered unnecessary and surplusage if a reasonable construction can be adopted which will give force to and preserve all of the terms of the statute. *Peo v. Perkins*, 85 Cal. 509; *Gates v. Salmon*, 35 Cal. 576; *Langenour v. French*, 34 Cal. 92; *Edwards v. Sweigert*, 15 Cal. App. 503; *Rumetsch v. Oakland*, 135 Cal. App. 267; *Davidson v. Burns*, 38 Cal. App. 2d 188; *Los Angeles Co. v. Emme*, 42 Cal. App. 2d. 239. Effect should be given to every part of these code sections, if such is possible, to the end that the different provisions are harmonized. Had the legislature intended the result for which defendant contends it had only to omit the clause above-mentioned and it would thereby clearly have effected that end. It is the duty of the Court to give effect not only to a statute or code section as a whole but to each and every part thereof—i.e., to every word and clause, and certainly to every distinct or co-ordinate provision or section. 23 Cal. Jur. 758.

It would seem to me that since the property was exempted from the operation of the mortgage it could be only revived by either of the two methods mentioned in Section 2965. Since the mortgage was not recorded in the county to which the property was removed and since it was not possessed for the purpose of sale as a pledge in order to satisfy the debt the sale had was contrary to the statute and amounted to a conversion of the property mortgaged.

The mortgagee at the time of sale was in the same position as a mortgagee in possession under an unrecorded chattel mortgage. *Loosemore v. Baker*, 175 Cal. 420; *Chelhar v. Acme Garage*, 18 Cal. App. 2d 775. Defendant received a preference within the four months period. This is voidable at the instance of the trustee in bankruptcy. *Noyes v. Bank of Italy*, 206 Cal. 266.

The motion for a new trial is denied.

Dated: March 24, 1950.

/s/ DAL M. LEMMON,  
United States District Judge.

[Endorsed]: Filed March 24, 1950.

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF  
APPEALS UNDER RULE 73(b)

Notice Is Hereby Given that Moore Equipment Co., Inc., a Corporation, Defendant above-named, hereby appeals to the Court of Appeals for the 9th Circuit from the final judgment entered in this action on February 16th, 1950, and from the whole thereof.

Dated: This 20th day of April, 1950.

/s/ DANIEL S. LANE,  
Attorney for Appellant.

[Endorsed]: Filed April 21, 1950.

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL

The parties to the above-entitled action, by their respective attorneys hereby stipulate and agree that the following documents may be designated as the contents of record on appeal pursuant to rule 75a.

1. Complaint filed herein by Plaintiff.
2. Answer of Defendant.
3. Stipulation of Facts.
4. Amendment to Stipulation of Facts.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Notice of Intention to Move for New Trial.
8. Order Denying Motion for New Trial.
9. Notice of Appeal.
10. Stipulation as to Record on Appeal.

SHAPRO & ROTHSCHILD,

By /s/ RAYMOND T. ANIXTER,  
Attorneys for Plaintiff.

JONES, LANE & WEAVER,

By /s/ DANIEL S. LANE,  
Attorneys for Defendant.

[Endorsed]: Filed May 26, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD  
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this court in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

Complaint,  
Answer of defendant,  
Stipulation of facts,  
Amendment to stipulation of facts,  
Finding of fact and conclusions of law,  
Judgment,  
Notice of intention to move for a new trial,  
Order denying motion for a new trial,  
Notice of appeal,  
Stipulation as to record on appeal.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 26th day of May, 1950.

C. W. CALBREATH,  
Clerk.

[Seal] By /s/ C. C. EVENSEN,  
Deputy Clerk.

[Endorsed]: No. 12559. United States Court of Appeals for the Ninth Circuit. Moore Equipment Co., Inc., a corporation, Appellant, vs. John O. England, as Trustee of the Estates of Ted E. Fisher and Maxeen R. Fisher, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed May 29, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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United States Court of Appeals,  
Ninth Circuit

Civil Action No. 12559

MOORE EQUIPMENT CO., INC., a Corporation,  
Appellant-Defendant,

vs.

JOHN O. ENGLAND, as Trustee of the Estates of  
TED E. FISHER and MAXEEN R. FISHER,  
Bankrupts,

Appellee-Plaintiff.

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD ON APPEAL

Appellant sets forth the following points on which he intends to rely on Appeal:

## I.

The Court erred in finding that Appellant was an unsecure creditor at the time that it repossessed the mortgaged personal property.

## II.

The Court erred in finding that Appellant's repossession of the mortgaged personal property constituted a voidable preference under Section 60B of the Acts of Congress relating to Bankruptcy.

## III.

The Court erred in its construction of Sections 2965 and 2966 of the Civil Code of the State of California in holding that Appellant did not re-establish a pre-existing valid lien by its act of taking possession of mortgaged personal property voluntarily removed by the mortgagor from the county of his residence.

Appellant further sets forth the following as a designation of all of the record which is material to the consideration of the Appeal:

1. Complaint.
2. Answer.
3. Stipulation of Facts.
4. Amendment to Stipulation of Facts.
5. Findings of Fact and Conclusions of Law.

6. Judgment.

Notice of Appeal.

Clerk's Certificate.

/s/ DANIEL S. LANE,

Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed June 19, 1950.

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[Title of Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL  
PARTS OF RECORD

Appellee sets forth herein a designation of additional parts of the record which he believes is material to the consideration of the appeal:

I.

Appellee believes that in addition to the portions of the record designated by Appellant that the following portion of the record is material to the consideration of the appeal:

1. Notice of intention to move for a new trial.
2. Order denying motion for a new trial.
3. Notice of appeal.
4. Stipulation as to record on appeal.

SHAPRO & ROTHCHILD.

By /s/ RAYMOND T. ANIXTER,

Attorneys for Appellee.

Affidavit of service by mail attached.

[Endorsed]: Filed June 15, 1950.

